

State immunity — Jurisdiction — Property — Functional nature of immunity — *Acta jure imperii* and *acta jure gestionis* — Immunity confined to *acta jure imperii* — Failure of lower courts to take this limitation into account — Premises of a diplomatic mission — Korean Embassy in Prague — Whether Republic of Korea immune from proceedings in Czech courts

Diplomatic relations — Immunity — Property — Korean Embassy in Prague — Whether Republic of Korea immune from proceedings in Czech courts — Whether Korean Embassy unjustly enriched — Whether immovable property used for purposes of State's diplomatic mission — Inviolability of premises of diplomatic mission and performance of mission's functions — Vienna Convention on Diplomatic Relations, 1961, Article 22 — United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, Article 13 — Whether first instance decision correct — The law of the Czech Republic

CLAIMS RELATING TO PREMISES OF A DIPLOMATIC MISSION
CASE (TYNGENE S.R.O. *v.* MUNICIPAL DISTRICT PRAGUE—TROJA
AND THE REPUBLIC OF KOREA—EMBASSY OF THE REPUBLIC
OF KOREA)

(Case No 21 Cdo 3095/2017)

Czech Republic, Supreme Court. 6 December 2017

(Doležilek, *President of the Senate*; Putna and Fiala, *Judges*)

SUMMARY:¹ *The facts:*—The plaintiff, a Czech company, commenced proceedings in the Czech Republic against the defendant, the Republic of Korea (the second defendant) for a payment of CZK 1,641,579.48 with ancillaries on the ground of unjust enrichment. The plaintiff alleged that the Korean Embassy in Prague was unjustly enriched by using the plaintiff's land as part of the premises of its diplomatic residence without a legal basis, with no lease having been concluded. The lower courts discontinued proceedings for lack of jurisdiction, holding that the Republic of Korea enjoyed immunity from the jurisdiction of Czech courts because the proceeding related to immovable property used for the purposes of the State's diplomatic mission—that is, in the

¹ Prepared by Dr Klara Polackova Van der Ploeg.

exercise of the State's public authority. The plaintiff filed an extraordinary appeal with the Supreme Court of the Czech Republic.

Held:—The appeal was allowed. The extraordinary appeal was well founded. The rulings of the lower courts were annulled and the case was remitted to the court of first instance for further proceedings.

(1) A State enjoyed immunity from jurisdiction only in proceedings which related to its conduct in the exercise of public authority (*acta jure imperii*). In matters arising from private-law relations characterized by the legal equality of their participants, the State did not enjoy functional immunity under international law, and Czech courts had jurisdiction to hear such matters² (paras. 17-18).

(2) International law generally permitted the conduct of proceedings against a foreign State before the courts of another State relating to the use of immovable property situated in the State of the forum. The United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004, which restated contemporary customary international law, exemplified this rule in its Article 13 (para. 19).

(3) The claim for unjust enrichment, in that the defendant had allegedly acquired the plaintiff's land without a legal basis, involved a private-law relationship characterized by the equality of the parties and not the exercise of public authority. It also related to the use of immovable property situated in the State of the forum and therefore involved an instance in which international law permitted claims against a foreign State before the courts of another State (para. 20).

(4) Under Article 22 of the Vienna Convention on Diplomatic Relations, 1961, a receiving State was under a special obligation to protect premises of a diplomatic mission, in particular against entry, execution or the taking of other measures of constraint. However, it was justified to allow proceedings against foreign States relating to immovable property used for the purposes of their diplomatic missions, provided that such proceedings would not infringe the inviolability of the premises of the diplomatic mission or entail interference with the performance of the functions of the mission³ (paras. 21-2)

(5) The proceedings against the defendant concerning unjust enrichment arising from the use of the plaintiff's land as part of the premises of its diplomatic mission neither interfered with the performance of the functions of its diplomatic mission nor violated Article 22 of the Vienna Convention on Diplomatic Relations on inviolability of the premises of the mission. The conclusion of the appellate court and the court of first instance regarding the lack of jurisdiction over the defendant was therefore incorrect (paras. 23-4).

² *State Immunity in Labour Law Matters Case*, 142 ILR 206.

³ *Popper's Villa Case*, 174 ILR 503.

The following is the text of the decision of the Supreme Court:⁴

RULING

[1] The Supreme Court of the Czech Republic decided in the Senate composed of the President JUDr Jiří Doležilek and Judges JUDr Mojmír Putna and JUDr Roman Fiala, on the legal matter of the plaintiff Tyngene s.r.o. with its seat at Prague 9—Vysočany, Lisabonská No 799/8, identification No 29039151, represented by Mgr Martin Štuksa, attorney with a registered seat at Prague 4, Kaplická No 1037/12, against the defendants (1) Municipal District Prague—Troja with the seat of the municipality office at Prague 7—Troja, Trojská No 230/96, identification No 45246858, represented by Mgr Jiří Nezhyba, attorney with registered seat at Brno, Údolní No 567/33, and (2) Republic of Korea—Embassy of the Republic of Korea with the seat of the embassy at Prague 6—Bubeneč, Slavíčkova No 5, represented by JUDr Daniel Futej, attorney with registered office at Prague 6—Dejvice, Thákurova No 676/3, concerning CZK 1,641,579.48 with ancillaries, conducted at the District Court for Prague 7 under Case No 29 C 20/2015, on the extraordinary appeal of the plaintiff against the ruling of the Municipal Court in Prague dated 17 February 2017, No 68 Co 68/2017-66, as follows:

[2] The ruling of the Municipal Court and the ruling of the District Court for Prague 7 dated 12 June 2016, No 29 C 20/2015-52, are hereby *annulled* and the matter is *remanded* for further proceedings to the District Court for Prague 7.

Reasoning

[3] By its petition submitted to the District Court for Prague 7 on 15 January 2015, the plaintiff requested the court to order the defendants to pay the plaintiff CZK 1,641,579.48 with statutory interest in the amount of 8.05% p.a. from 6 December 2015 until full payment, specifying that a performance by one of the defendants extinguishes the obligation of the other defendant to the extent of such performance. [The plaintiff] argued in particular that it is the owner of land plot No [anonymized] with area of 13,205 sq m, garden, in P, cadastral area T, entered on the list of ownership No [anonymized] with the Cadastral Office for P, Cadastral Branch Office P; that defendant (1) administers

⁴ The paragraph numbers have been inserted by the editors.

as the municipal district the neighbouring land plot No [anonymized], which is owned by P, and that defendant (2) used a part of the plaintiff's land plot of the area of 1,589 sq m, which is fenced off together with the land plots and a building administered by defendant (1) and which defendant (1) leased to defendant (2), without any legal basis until 1 April 2014; and that after the plaintiff discovered, while clearing shrubs from his land plot, that the fencing does not correspond to the cadastral boundary of the land plots, it concluded with defendant (1) a lease for this part of the plaintiff's land plot effective from 1 April 2014. [The plaintiff] submits that defendant (2) used the relevant part of the plaintiff's land plot together with the neighbouring land plot, which it leases from defendant (1) with the knowledge of defendant (1); and that defendant (1) therefore caused the plaintiff damage by permitting defendant (2) to use the part of the plaintiff's land plot without legal basis; and that defendant (1), out of negligence, or intentionally, breached its legal obligation to refrain from infringing the plaintiff's ownership right, which caused an enrichment of defendant (2).

[4] Defendant (2) argued in particular that the court of first instance "does not have jurisdiction to decide on the merits" due to § 7 of Act No 91/2012 Coll, because the alleged conduct, which the plaintiff describes in its petition, could only take place in connection with the exercise of State authority of a sovereign State, because the affected real property of the plaintiff is located in the vicinity of the real property that defendant (2) uses for purposes connected to the performance of the functions of the diplomatic mission of the Republic of Korea in the territory of the Czech Republic, specifically as the residence of its diplomatic agents.

[5] By a ruling dated 12 June 2016, No 29 C 20/2015-52, the District Court for Prague 7 discontinued the proceedings against defendant (2) and decided that the plaintiff should pay defendant (2) its costs of the proceedings in the amount of CZK 55,176 via its attorney JUDr Daniel Futej. Having established that the plaintiff demands that defendant (2) return the gains unjustly acquired by using the part of [the plaintiff's] land plot, which defendant (2) uses for purposes connected to the performance of the functions of the diplomatic mission of the Republic of Korea, specifically as the residence of its diplomatic agents, [the District Court] concluded that Czech courts do not have jurisdiction to hear and decide the matter, because while using the particular part of the land plot, defendant (2) acted in connection with the exercise of State authority, and therefore the functional immunity of the State, stipulated in § 7 of Act No 91/2012 Coll, applies.

[6] On plaintiff's appeal, by a ruling dated 17 February 2017, No 68 Co 68/2017-66, the Municipal Court in Prague confirmed the ruling of the court of first instance and decided that the plaintiff and defendant (2) are not mutually entitled to compensation for costs of the appellate proceedings. [The Municipal Court] agreed with the conclusion of the court of first instance regarding the lack of jurisdiction of the court in relation to defendant (2) and reasoned that if it were to decide about the part of the land plot, which the plaintiff argues defendant (2) uses unlawfully in connection with the performance of State, government and other public competencies and functions, the inviolability of the premises of the mission would not be ensured as guaranteed by Article 22 of the Vienna Convention on Diplomatic Relations. [The Municipal Court] stated that the alleged conduct of defendant (2) could only take place in connection with the performance of State or government authority of a sovereign State because, according to the assertion of defendant (1), defendant (2) uses "the part of land plot No [anonymized], a part of which is the building of a family house No [anonymized] in cadastral area T" for the purposes of the mission as the residence of its ambassador (or other diplomatic agents), that is exclusively in the exercise of its State authority.

[7] The plaintiff filed an extraordinary appeal against the appellate court's ruling. [The plaintiff] argues that the appellate court arrived at the conclusion about the exemption of defendant (2) from the jurisdiction of Czech courts on the basis of an incorrect conclusion that the conduct of defendant (2) specified in the petition could only take place in connection with the performance of State or government authority of a sovereign State and that [the appellate court] did not consider the question of whether the plaintiff's pecuniary claim—a recovery of a claim against defendant (2)—may endanger the performance of the functions of the mission. [The plaintiff] considers that defendant (2) did not act as a sovereign bearer of State or government authority as when [defendant (2)] concluded with defendant (1) the lease for the use of the land plot neighbouring with the plaintiff's land plot, it entered into an equal private-law relationship with the landlord, [the landlord being] entitled to performance under the lease from defendant (2) as well as from any other subject[. The plaintiff also considers] that defendant (2) could not have acted differently even when it used a part of the plaintiff's land plot on a legal basis, because even this relationship is a relationship of two equal subjects. [The plaintiff] submits that it is neither the point nor the purpose of the principle of the exemption of foreign States from the jurisdiction of Czech courts that these foreign States should be exempt from the jurisdiction of Czech courts en bloc

in relation to all their possible activities in the territory of the Czech Republic but rather that foreign States should not be constrained in their diplomatic activity in the territory of the Czech Republic; the claim by which [the plaintiff] lawfully demands defendant (2) to pay the sum of money neither constrains defendant (2) as a foreign State, that is its mission in the performance of its diplomatic activities, nor interferes with the premises of the mission, which are inviolable. The plaintiff moved for the court of extraordinary appeal to annul the rulings of the appellate court and the court of first instance and to remand the matter to the court of first instance for further proceedings.

[8] Defendant (2) moved for the court of extraordinary appeal to reject the plaintiff's extraordinary appeal, because [the extraordinary appeal] did not meet all the requirements that the statute sets for extraordinary appeal, or, alternatively, to dismiss [the extraordinary appeal], because the use of real property for the purposes of a mission does not involve and even cannot involve commercial or other private-law activity and this conduct could only take place in connection with the performance of State or other similar authority of a sovereign State.

[9] The Supreme Court of the Czech Republic as the court of extraordinary appeal (§ 10a of the Civil Procedure Code) examined the plaintiff's extraordinary appeal pursuant to Act No 99/1963 Coll, Civil Procedure Code, as in force until 29 September 2017 (hereinafter the "CPC"), because the extraordinary appeal challenges a ruling of an appellate court handed down before 30 September 2017 (cf. Article II Point 2 of Act No 296/2017 Coll, which amends Act No 99/1963 Coll, Civil Procedure Code, as amended, Act No 292/2013 Coll, on Special Judicial Proceedings, as amended, and some other acts). Having established that the extraordinary appeal was filed against a final ruling of the appellate court by an entitled person (party to the proceedings) within the time limit stipulated by § 240 Section 1 of the CPC, [the Supreme Court] first considered the question of the extraordinary appeal's admissibility.

[10] An extraordinary appeal may challenge final decisions of an appellate court as provided by statute (§ 236 Section 1 of the CPC).

[11] Unless otherwise stated, an extraordinary appeal is admissible against any appellate court decision that concludes an appellate proceeding if the challenged decision depends on the settlement of a substantive or procedural law question, in the settlement of which the appellate court departed from the settled decision-making practice of the court of extraordinary appeal or which the court of extraordinary appeal has not yet settled, or which the court of extraordinary appeal decides differently or if the court of extraordinary appeal should assess the legal question differently (§ 237 of the CPC).

[12] The challenged decision of the appellate court depends, *inter alia*, on the settlement of a procedural law question of whether (and if so under what conditions) Czech courts have jurisdiction over a foreign State in proceedings involving claims of unjust enrichment acquired by using a plot of land without a legal basis for the purposes of a diplomatic mission. Because this legal question has not yet been settled in the extraordinary appeal court's practice, the extraordinary appeal against the appellate court's ruling is admissible pursuant to § 236 of the CPC.

[13] Having examined the appellate court's ruling pursuant to § 242 of the CPC without a hearing (§ 243a Section 1 first sentence of the CPC), the Supreme Court of the Czech Republic concluded that the plaintiff's extraordinary appeal is well founded.

[14] Given that the plaintiff filed the petition for the payment of CZK 1,641,579.48 on 15 January 2015, the present matter must be considered even nowadays pursuant to Act No 91/2012 Coll, on International Private Law, as in force until 13 December 2015 (hereinafter the "International Private Law Act").

[15] Pursuant to § 7 Section 1 of the International Private Law Act, foreign States are exempt from the jurisdiction of Czech courts to the extent such proceedings arise from their conduct and acts made in the performance of their State, government and other public competencies and functions, inclusive of their property used or intended for use for such performance.

[16] Pursuant to § 7 Section 2 of the International Private Law Act, the exemption from the jurisdiction of Czech courts does not extend to other conduct, acts or instances to the extent in which general international law or international treaties permit claims against a foreign State before the courts of another State.

[17] It follows from the cited provisions, *inter alia*, that foreign States enjoy immunity (exemption from jurisdiction) before Czech courts in the instances in which the proceedings arose from conduct and acts the foreign States made in the performance of State, government and other public competencies and functions (that is, in the exercise of public authority) and which involve property used or intended for use in such performance (property serving government purposes). However, the immunity does not extend to other conduct, acts or instances in which general international law or international treaties allow claims to be brought against the foreign State before the courts of another State.

[18] The content of State immunity previously perceived as absolute, with any link of a State to the subject-matter of the dispute

leading to the finding of immunity and a consequent impossibility of conducting proceedings involving [the State] before a foreign court, has developed over time through the dynamic progress of international relations towards a functional conceptualization of this legal relationship, which also forms the basis for the current law on the exemption of foreign States from the jurisdiction of Czech courts in the International Private Law Act (cf. also the explanatory memorandum on § 7 of this Act, which specifically invokes this conceptualization). It is beyond doubt that a State enjoys for itself and its property jurisdictional immunity before the courts of another State (*par in parem non habet jurisdictionem*). However, the prevailing developmental trends have crystallized into the conclusion that a State cannot invoke its immunity from jurisdiction—in addition to the cases in which [the State] expressly waived [this immunity]—even in proceedings relating to [the State's] commercial transactions, labour contracts, ownership, possession, or use of property, in cases of compensation for damage caused to property or persons, in matters of industrial or intellectual property, in relation to participation in business companies; that is, in principle, in situations in which the State does not act in exercise of public authority (*acta iure imperii*). When a foreign State does not act as a sovereign bearer of public authority but rather as a legal person in matters arising from private-law relations characterized by legal equality of their participants, rules of international law justify the conclusion that this legal person—the foreign State—does not enjoy functional immunity and that the Czech courts do have jurisdiction in these matters (cf. ruling of the Supreme Court dated 25 June 2008, Case No 21 Cdo 2215/2007, published as No 26 in the Collection of Judicial Decisions and Opinions, 2009).

[19] The United Nations (UN) Convention on Jurisdictional Immunities of States and Their Property, adopted by the UN General Assembly on 2 December 2004 in New York (hereinafter the “UN Convention”), restates the contemporary state of customary international law. Although [the UN Convention] is yet to enter into force (only 21 out of a required 30 States have so far ratified it), it is a generally accepted point of departure for the regime of State immunities. The UN Convention incorporates both the general rule that States enjoy immunity from jurisdiction of the courts of another State (Article 5 of the UN Convention) and a closed list of exemptions from this immunity (Articles 7-17 of the UN Convention). These exemptions include, inter alia, proceedings which relate to rights and obligations arising out of the use of immovable property situated in the State of the forum (cf. Article 13 of the UN Convention).

[20] In the matter under consideration the plaintiff requests an award of compensation on the grounds of unjust enrichment (in the amount of the usual rent), which defendant (2) allegedly acquired by using a part of [the plaintiff's] land plot as one of the land plots a part of which is the residence of diplomatic agents of defendant (2) without a legal basis. Unjust enrichment acquired by using a part of [the plaintiff's] land plot without a legal basis (without a lease contract concluded) is a private-law relationship characterized by the equality of the parties, and—considering the above—in itself does not arise from the conduct or acts made in the performance of State, government or other public competencies and functions[. It] is simultaneously an instance in which even international law allows claims against a foreign State before the courts of another State (proceedings which relate to rights and obligations arising out of the use of immovable property situated in the State of the forum). However, defendant (2) allegedly used the plaintiff's land plot for the purposes of the diplomatic mission—as the residence of diplomatic agents.

[21] The “premises of the mission” are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission, including the residence of the head of the mission (Article 1(i) of the Vienna Convention on Diplomatic Relations, published as Regulation No 157/1964 Coll). The premises of the mission are inviolable, and the agents of the receiving State may not enter them, except with the consent of the head of the mission (Article 22(1) of the Vienna Convention on Diplomatic Relations). The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity (Article 22(2) of the Vienna Convention on Diplomatic Relations). The premises of the mission, their furnishings and other property thereon and the means of transport of the mission are immune from search, requisition, attachment or execution (Article 22(3) of the Vienna Convention on Diplomatic Relations).

[22] It follows that the premises of the mission enjoy a special protection, in particular against entry, execution or the taking of other measures of constraint. However, the immunity from jurisdiction of a foreign State in relation to the premises of the mission is not expressly regulated. It is therefore justified—considering the development of international law—to allow all proceedings against foreign States that relate to immovable property used for the purposes of these States' diplomatic missions, provided that [these proceedings] will not violate the obligations under the Vienna Convention on Diplomatic Relations

guaranteeing in particular the inviolability of the premises of the missions and will not interfere with the performance of the functions of the mission. Even an unfavourable decision against the foreign State will not infringe the protection of the premises of the mission, because the agents of the receiving State will still be prohibited from entering the premises of the mission without the consent of the head of the mission or subjecting the premises of the mission to execution (P. Caban, *Jurisdikční imunity států [Jurisdictional Immunities of States]* (Univerzita Karlova v. Praze, Právnická fakulta, 2007) pp. 47-8).

[23] The proceedings concerning the payment of CZK 1,641,579.48 with ancillaries on the grounds of unjust enrichment of defendant (2) acquired in a manner alleged by the plaintiff do not interfere with the performance of the functions of the mission and also do not violate Article 22 of the Vienna Convention on Diplomatic Relations on inviolability of the premises of the mission; there is therefore no reason to limit the plaintiff's opportunity to bring its claims against defendant (2)—a foreign State—before Czech courts. The conclusion of the appellate court (and the court of first instance) about the lack of court jurisdiction in relation to defendant (2) is therefore incorrect.

[24] As it follows from the aforesaid that the appellate court's ruling is incorrect and there are no grounds for the extraordinary appeal proceedings to be discontinued, the extraordinary appeal to be rejected, the extraordinary appeal to be dismissed or the appellate court's ruling to be modified, the Supreme Court of the Czech Republic annulled this ruling (§ 243e Section 1 of the CPC.). As the reasons for the annulment of the appellate court's ruling apply also to the ruling of the court of first instance, the Supreme Court of the Czech Republic annulled this decision as well and remanded the matter to the court of first instance (District Court for Prague 7) for further proceedings (§ 243e Section 2 second sentence of the CPC), in which the court of first instance shall also consider the question of the court's subject-matter jurisdiction vis-à-vis defendant (2) (cf. § 9 Section 2 Letter c) of the CPC).

The legal opinion expressed in this ruling is binding; . . . [arrangement regarding the costs of the proceedings].

No legal remedy is available against this ruling.

[Report: Unofficial translation by Dr Klara Polackova Van der Ploeg (Czech original)]